

Updating Charities and Not-For-Profit Organizations on recent legal developments and risk management considerations.

JUNE 2014

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21st Annual Church & Charity Law™ Seminar

Hosted by Carters Professional Corporation in Greater Toronto, Ontario, on **November 13, 2014.**

Details and online registration available soon.

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RECENT PUBLICATIONS AND NEWS RELEASES

CRTC Releases Information Bulletin on Compliance Programs for CASL

Ryan Prendergast in *Charity Law Bulletin* No. 344, June 25, 2014.

On June 19, 2014, the Canadian Radio-television and Telecommunications Commission (CRTC) published a new bulletin concerning Canada's anti-spam legislation (CASL). Compliance and Enforcement Bulletin CRTC 2014-326 (the "Bulletin") provides guidelines from the CRTC to help businesses develop corporate compliance programs.

The Bulletin provides "general guidance and best practices" for businesses, but will also be of assistance to charities and non-profit organizations where their activities include the sending of "commercial electronic messages" (CEM) as set out in CASL. This *Charity Law Bulletin* provides a summary of some of the guidance and best practices contained in the Bulletin which may have some application to charities and non-profit organizations.

Although the Bulletin provides advice preparing a compliance program for both the CRTC *Unsolicited Telecommunications Rules* (referring to the Do Not Call List) and for CASL, the focus of this *Charity Law Bulletin* will be on the advice the Bulletin contains with regard to establishing a compliance program for CASL. Charities and non-profit organizations conducting activities that the *Unsolicited Telecommunications Rules* apply to are encouraged to refer directly to the Bulletin for additional guidance.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2014/chylb344.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2014/chylb344.htm>

Legislation Update

Terrance S. Carter.

Federal Bill C-31, Budget 2014 Implementation Legislation

Federal Bill C-31, *Economic Action Plan 2014 Act, No. 1*, received Royal Assent on June 19, 2014. Bill C-31 implements a portion of Budget 2014's proposals affecting charities and not-for-profits. Some of these proposals came into force on June 19, 2014 upon Royal Assent. The extension of the carry-forward period from five years to ten years with respect to certain donations of ecologically sensitive land has come into force, and applies to donations made after February 10, 2014. The provision of a new de-registration power to enable the Minister of National Revenue to refuse to register a charity or revoke its registration where it accepts a donation from a state supporter of terrorism is also now in force and applies

in respect of gifts accepted after February 10, 2014. For certified cultural property acquired as part of a gifting arrangement that is a tax shelter, the removal of the exemption from the rule that deems the value of a gift to be no greater than its cost to the donor also came into force and applies to donations made after February 10, 2014. Budget 2014's proposals are discussed in further detail in *Charity Law Bulletin No. 330* (available online at <http://www.carters.ca/pub/bulletin/charity/2014/chylb330.pdf>).

Federal Bill C-31, *Trade-marks Act* Amendments

Hidden within the omnibus Bill C-31 are provisions to amend the *Trade-Marks Act*. Although Bill C-31 received Royal Assent on June 19, 2014, these provisions have not yet come into force. They will come into force on a day to be fixed by order of the Governor in Council. A summary of the amendments to the *Trade-marks Act* is discussed in "Coming Changes to the Trade-marks Act" by Sepal Bonni, later in this *Charity Law Update*.

Federal Bill S-4, the *Digital Privacy Act*

The government is moving forward with Bill S-4, the *Digital Privacy Act*, despite a much published warning from the new Privacy Commissioner, Daniel Therrien. After receiving second reading on May 8, 2014, the Senate passed the Bill, which entered into first reading in the House of Commons on June 17, 2014. Bill S-4 proposes amendments to the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") that would create greater opportunity for organizations to disclose personal information to certain organizations and individuals without the subject's knowledge or consent. If passed, Bill S-4 would also restrict organizations from informing individuals that their personal information was shared with enforcement and security agencies under certain circumstances. Contradictory to this new legislation, on June 13, 2014 the Supreme Court of Canada in essence eviscerated voluntary disclosure by organizations in *R. v Spencer* (2014 SCC 43). In light of this decision, the new Privacy Commissioner is encouraging "Parliamentarians to carefully consider the implications of this ruling as they deliberate ..." on the legislation. As the House of Commons began their summer break on June 23, 2014, and is not set to resume until September 15, 2014, Bill S-4 will remain in limbo until at least that time. Bill S-4 is discussed in more detail in *Charity Law Bulletin No. 341* (available online at <http://www.carters.ca/pub/bulletin/charity/2014/chylb341.pdf>).

Criminal Code Regulations Terrorist Entities Updated

On June 6, 2014, the Governor in Council amended the *Regulations Amending the Regulations Establishing a List of Entities* annexed to the *Criminal Code of Canada* to include two new terrorist entities. The list of entities now includes the Movement for Oneness and Jihad in West Africa (MOJWA)

as well as Al-Murabitoun. As such, it is now a criminal offence to knowingly deal in the property or finances of these groups, along with 61 other listed terrorist entities.

2015 Federal Budget Pre-Budget Consultation Launched

On June 6, 2014, the House of Commons Standing Committee on Finance launched its pre-budget consultation process for the 2015 Federal Budget. Interested Canadians are invited to participate in the process. Suggestions and the pre-budget report compiled by the Committee will be considered by the Minister of Finance in the development of the 2015 federal budget. As the Federal Budget almost always impacts charities in some way, any charities with concerns are encouraged to participate in the pre-budget consultation process. Written submissions must be made by August 6, 2014 at midnight eastern standard time and must be no longer than 2,000 words in length, including an executive summary.

For more details on the consultation and for contact information, please see:

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6653302&Parl=41&Ses=2>.

CRA News

Esther S.J. Oh

CNCA Guide Webpages Updated

On June 11, 2014, CRA updated three webpages addressing matters relating to continuance of existing federal corporations under the *Canada Not-for-Profit Corporations Act* (“CNCA”). The first update entitled “Completing Form 4031, Articles of Continuance (transition)”, contains important information to assist federally incorporated charities complete the Articles of Continuance (Form 4031). The webpage is available at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtng/nfpc/frm4031-eng.html>.

The second update entitled “Advising the Charities Directorate”, provides a list of documents for federally incorporated charities to file with the Charities Directorate once they have continued under the CNCA. The webpage is available at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtng/nfpc/flng-dcs-eng.html>.

The third update, entitled “Continuance (transition) Checklist”, contains a form to be used by registered charities that have completed the CNCA continuance when submitting copies of the continuance documents to CRA. The webpage is available at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtng/nfpc/cntnnc-chcklst-eng.html>.

New Application Form for Religious Sects Seeking CPP Exemption

On May 31, 2014, CRA made available on its website an updated Form CPT17 entitled “Application to Certify a Religious Sect or a Division of a Religious Sect so that its Self Employed Members can Apply to be Exempt from the Canada Pension Plan.”

Members of religious sects can elect not to contribute to the Canada Pension Plan on self-employed earnings. Information on how to proceed for an election not to contribute to Canada Pension Plan on self-employed earnings is available at the following link: <http://www.cra-arc.gc.ca/tx/hm/spcl/rlgs-eng.html>.

CPT17 allows authorized spokespersons for religious sects or divisions of religious sects to apply to certify the sect or division and receive a registration number from CRA. The registration number would then allow self-employed members of the sect or division to apply for an exemption from paying into the Canada Pension Plan for religious reasons. CPT17 is available at: <http://www.cra-arc.gc.ca/E/pbg/tf/cpt17/cpt17-14e.pdf>.

CRA Encourages Voluntary Disclosure for Non-Compliance

CRA has outlined its process of voluntary disclosure for charities that wish to become compliant on its webpage entitled “Bringing Charities Back into Compliance” that was last updated in the fall of 2013. The webpage explains that CRA monitors registered charities to ensure compliance with applicable requirements under the *Income Tax Act* (Canada) and common law rules that apply to charities. When CRA discovers non-compliance, CRA can use a series of progressive compliance measures ranging from education letters or compliance agreements to monetary penalties, suspended tax-receipting privileges or revocation of charitable status. On its webpage, CRA states that most non-compliance by registered charities is unintentional, accidental and often of low material consequence and can be addressed through education letters and compliance agreements to bring the charity back into compliance. However, more serious penalties would apply for serious issues of non-compliance, such as involvement in tax shelters or issuance of false receipts.

CRA encourages charities to approach CRA to discuss non-compliance with the objective of resolving difficulties and helping bring the charities back into compliance. The CRA webpage indicates that the process involves providing CRA with information concerning the charity and the areas of non-compliance. For charities that are apprehensive about providing CRA with information on non-compliance, those charities may contact CRA in writing on a no-name basis. However, while not stated on its webpage, it would be prudent for a charity to obtain advice from legal counsel before proceeding with either a named

or no-name voluntary disclosure. For further details on compliance and voluntary disclosure, visit CRA online at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/dtng/vlntry-dsclsr-eng.html>

Corporate Update

Theresa L.M. Man

Canada Not-for-Profit Corporations Act

The number of corporations incorporated under Part II of the *Canada Corporations Act* (CCA) that have continued under the new *Canada Not-for-profit Corporations Act* (CNCA) grew from 3795 at the end of April to 4175 at the end of May. This still leaves 12,825, *i.e.*, 75%, of approximately 17,000 corporations that have not continued. Failure to continue under by the deadline may result in those corporations being dissolved. However, dissolution is not automatic. See *Charity Law Bulletin* No. 336 (<http://www.carters.ca/pub/bulletin/charity/2014/chylb336.pdf>) for an overview of the dissolution process and how to revive such dissolved corporations.

Corporations Canada continues to actively remind Part II CCA corporations of the need to continue by the deadline. With less than four months left before the deadline, time is fast running out to complete the continuance process, let alone time to hold two separate meetings to collapse membership classes in order to avoid class approval. As well, registered charities that want to revise their corporate objects may want to consider first continuing using the same objects and then revising the objects afterwards.

Ontario Not-for-Profit Corporations Act

In the May 2014 *Charity Law Update*, we reported that Bill 85 amending portions of the *Ontario Not-for-Profit Corporations Act, 2010* (“ONCA”) died on the Order Paper as a result of the calling of the provincial election on May 2, 2014. This means that a new bill will need to be re-introduced. The Ontario Ministry of Government and Consumer Services’ website indicates that the ONCA is not expected to come into force before 2016 (http://www.sse.gov.on.ca/mcs/en/pages/not_for_profit.aspx). With the Ontario Liberal Party, which originally introduced the ONCA, winning the election, many in the sector are cautiously hopeful that there might be an earlier proclamation date, possibly late summer of 2015, if Bill 85 is reintroduced into the Legislature by fall 2014. The government had previously indicated that the ONCA would not be proclaimed until at least 6 months after the enactment of Bill 85 in order to allow not-for-profit corporations to prepare for transition. Those interested in the progress of the ONCA are encouraged to monitor the Ministry’s website for updates.

Anti-Spam (CASL) Tip #5: How the Three-year Transition Period Applies to You

Ryan M. Prendergast.

With the implementation date for Canada's anti-spam legislation ("CASL") now only days away, many readers will no doubt have found their inbox crowded with requests for express consent prior to July 1, 2014. While obtaining express consent (if your organization sends commercial electronic messages (CEMs)) before this implementation date is no doubt a prudent measure, the sun will continue to rise for charities and non-profit organizations that have not done so on July 2, 2014. In this regard, section 66 of CASL provides a three-year transition period that charities and non-profit organizations may take advantage of in order to obtain express consent if needed.

Many charities and non-profit organizations remain confused with regard to how this transition period applies to them. During the three-year transition period, existing implied consents will be deemed to continue during the 3-year period, regardless of the ordinary time limitations set out in CASL. For example, a donation to a registered charity is considered a non-business relationship under CASL that creates implied consent for a period of two-years. During the transition period, this implied consent relationship will be in place for 3 years.

On June 6, 2014, the Canadian Radio-television and Telecommunications Commission (CRTC) published a detailed presentation on CASL. During the presentation, representatives of the CRTC clarified how the CRTC will interpret section 66. The presenters were careful to note that they were providing "staff level guidance" which, while not binding on the CRTC, provides some direction concerning how CRTC staff view the transitional period. In this regard, the CRTC stated that if an entity has implied consent through an existing business or non-business relationship, and the relationship involved the sending of CEMs, then there will be deemed implied consent throughout the three-year transition period (provided that a recipient may withdraw their consent at any time). The CRTC stated that "you could go back 25 years in theory" in relation to applying this interpretation to implied consents during the transition period.

It should be noted, however, that the CRTC FAQ webpage concerning CASL has indicated that this only applies to implied consents from existing business and non-business relationships that were in place *before* July 1, 2014. An implied consent that occurs after July 1, 2014, will be subject to the ordinary time limitations. The practical result is that charities and non-profit organizations that send CEMs that have not obtained express consent prior to July 1, 2014 can continue to request express consent through electronic messages after July 1, 2014 where they had implied consent prior to (or during) the transitional period. However, after July 1, 2014, since a request for express consent is itself a CEM, charities and non-profits

that cannot rely on implied consent and do not already have express consent can no longer seek express consent.

The CRTC Information Session on CASL can be found online at:

<http://www.crtc.gc.ca/eng/com500/info.htm>.

CRTC “Frequently Asked Questions about Canada’s Anti-Spam Legislation” are also online at:

<http://www.crtc.gc.ca/eng/com500/faq500.htm>

Taxation of Social Assistance Payments

Linsey E.C. Rains.

On March 26, 2014, the Canada Revenue Agency (“CRA”) released a technical interpretation (#2013-0495661I7) commenting on financial assistance payments made by a U.S. charitable trust (the “Fund”) to its former employee. The issue was whether the payments were taxable in the hands of the former employee. CRA considered whether the payments were received by virtue of the individual’s employment, personal capacity, or as a windfall. CRA did not focus on the fact the payor was a U.S. charity, which suggests similar payments made by Canadian registered charities to former employees would be treated the same.

Voluntary payments and other valuable transfers or benefits received by employees from employers, or from others, by virtue of an office or employment, are included in income pursuant to s. 5(1) or 6(1)(a) of the *Income Tax Act* (“ITA”). As such, gifts from employers are generally taxable. CRA further stated that it is a question of fact whether an individual receives an amount by virtue of employment or in his or her personal capacity. An amount is received in an individual’s personal capacity where the amount is philanthropic; voluntary; not based on employment factors (e.g. performance, position, years of service); and not made in exchange for employment services.

In this instance, CRA determined the amounts were not received by virtue of employment or windfall, but in the former employee’s personal capacity. The Fund provided payments to former employees who, because of age or physical disability, were unable to support themselves. Eligibility was based on length of service, but was not otherwise tied to the individual’s employment records and was not a pension. Amounts received from the Fund did not impact the individual’s pensions or other benefits. Eligibility was periodically reviewed and payments modified or discontinued if an individual’s circumstances changed.

Additionally, individuals had to apply for assistance, which made it unlikely that the payments were a windfall. Instead CRA considered the payments to be “social assistance payments” under paragraph 56(1)(u) of the ITA. Paragraph 56(1)(u) requires the inclusion of payments “made on the basis of a means, needs or income test” and not found to be “otherwise required to be included in computing the income” of the individual or his or her spouse or common-law partner in the calculation of an individual’s net income. However, the amounts are deductible under paragraph 110(1)(f) and not included in computing the individual’s taxable income. Although not addressed by the technical interpretation, registered charities operating similar funds may wish to consult CRA to see whether T5007 slips should be issued for such payments.

Gifts Upheld Despite CRA Rejection of Donation Receipt

Jennifer M. Leddy.

On May 29, 2014, the Supreme Court of Canada denied, without reasons, leave to appeal from the British Columbia Court of Appeal case of *Neville v National Foundation for Christian Leadership*. The issue in the case was whether the National Foundation for Christian Leadership (the “Respondent”) had to return “donations” made to it by Ken and Monica Neville (the “Appellants”) because the Canada Revenue Agency (CRA) disallowed a tax credit for the donations. .

In 2002 the Appellants made two donations in the total amount of \$6,250 to the Respondent and received a tax receipt for the amount of the donations. The Appellants also subsequently received scholarships for their daughter in the amount of \$6,408. The Respondent’s literature contained a disclaimer warning donors that it made no representation about the income tax treatment of the donations. As it turns out, CRA disallowed a tax credit for the donations on the basis that they were “not gifts in law because they were intended to directly or indirectly benefit a person who was not dealing at arms’ length with the sponsor”, the sponsor being the Appellants.

The Appellants and others contested this finding in the Tax Court of Canada and Federal Court of Appeal but were unsuccessful. Once the litigation with CRA concluded, the Appellants pursued the Respondent in the Supreme Court of British Columbia (SCBC) for a refund of the donations. While accepting that the donations were not gifts for the purposes the *Income Tax Act*, the SCBC found that they were gifts at common law, as “the essential elements of a gift... are that one gives, that there is delivery of the gift and that the person to whom the gift has been made accepts.”

The Appellants argued that the gifts were made for the purpose of attracting a tax benefit and that the failure of the donations to attract a tax benefit vitiated the gifts because the Respondent paid the scholarships to their daughter. The SCBC rejected this argument, stating that the Appellants' purpose in making the gift was to donate to a foundation that supported Christian students attending Christian schools. It also stated that it was clear that the Appellants understood that their daughter would receive a scholarship or bursary from the Respondent and that there was no guarantee of a tax benefit. Accordingly, the primary purpose of the gift was fulfilled and the gift was not vitiated. In particular, the Respondent did nothing to vitiate the gift. Rather, the actions of CRA "vitiating not the gift but its tax exempt status." Alternatively, if the donations were not a gift, there was no unjust enrichment because the Appellants received a bursary for their daughter and a tax receipt, which was what they were expecting to receive. Moreover, the loss of the tax benefit enriched the Government not the Appellants.

Although the applicants appealed their case to the Court of Appeal for British Columbia and, ultimately, the Supreme Court of Canada, both courts denied leave to appeal. This case serves as a reminder to charities and donors alike that, in instances where a benefit is received in exchange for a gift, the status of the gift will not be affected even if issued charitable receipts are later disallowed by CRA. In other words, the disallowance of a tax credit for a donation does not entitle the donor to demand the money back from the charity. In fact, the charity could be at risk of breach of trust of charitable property if it refunded the donor because it would be transferring charitable funds to a non qualified donee for a non charitable purpose. The SCBC case is available online at: <http://www.courts.gov.bc.ca/jdb-txt/SC/13/01/2013BCSC0183.htm>.

Tax Court Finds Donation Receipt Fraudulent

Esther S.J. Oh.

On May 13, 2014, the Tax Court of Canada released its judgment in *Hassan v The Queen* (the "Hassan case"), a fraudulent receipting case. The *Hassan* case was an informal appeal by Mr. Hassan involving a 2009 claim for a charitable tax credit reportedly made to the charity, Operation Save Canada's Teenagers. Although Hassan's 2009 receipt was for a \$25,000 donation, Hassan claimed that only \$300 was paid in 2009, with the remainder paid in 2010.

In this regard, Hassan claimed that he had made a pledge at the end of 2009 to make \$25,000 of donations by the end of late 2010. His donations were allegedly made in cash, although the court noted that Hassan's bank statements and schedule did not line up with his alleged cash donations. Hassan could not describe

the charity's operations or describe what the charity did at its head office even though Hassan had allegedly driven to the head office almost 20 times to make the cash donations.

The court found that the 2009 receipt for \$25,000 was based upon an alleged \$300 donation and only a pledge to donate a total of \$25,000 by the end of 2010, which is not permitted under the *Income Tax Act*. The court stated that it did not believe that Hassan even made the \$300 donation. The court further stated that even if Hassan did pay \$300 to the charity, the monies would have been to obtain a \$25,000 receipt and therefore did not qualify as a charitable gift at law.

With respect to the charitable donation receipt, the court found that the 2009 receipt did not satisfy the prescribed information requirements and included a wrong name, no clear description of the location of where the gift was made, an incorrect amount, and a wrong or missing date.

In closing, the court found that "it appears almost certain that the program involved a fraud on the Canadian tax system." Hassan's oral testimony was not accepted by the court as being true, although the court indicated it was unclear whether Hassan was complicit or merely duped. By the date of the appeal, the charity's registration was revoked by CRA for filing falsified documents on both donations received and charitable and other expenditures made. The charity had submitted no records to support any donations received by it and CRA was not able to locate any such records on further investigation. Hassan's appeal was therefore dismissed with costs.

The *Hassan* case is available online at: <http://canlii.ca/t/g75d5>.

Court Finds Trustee Liable for Improper Delegation

Jacqueline M. Demczur.

In a case that will be of interest to directors of charities who are involved in investment decision making, the Ontario Court of Appeal in *Penman v Penman* dismissed a co-trustee's appeal to set aside the trial court's ruling made in relation to the personal liability of a trustee. The appeal, heard on January 23, 2014, considered whether co-trustee, Mary Lou McGilvray (the "appellant"), was personally liable for trust funds wrongfully removed from a trust created for the benefit of her late relatives' grandchildren.

At trial court, the appellant submitted that she acted honestly, reasonably, and in good faith, supported by legal advice from her nephew. She further submitted that she was "duped" by her two nephews, who wrongfully used the trust funds for their own benefit. However, the trial court judge held that she had nonetheless breached her obligations as a co-trustee. Rather than acting reasonably as required under s.

27(1) of the *Trustee Act* (Ontario), the trial judge found that the appellant abdicated her duties by delegating all her powers, duties and authority to her nephews. She had further failed to act reasonably when she did not properly consider whether the proposed investments were appropriate, failed to inquire about the proposed investment of the funds, and failed to follow up regarding their status. The trial judge found that this amounted to wilful neglect and found the appellant in default of her duties as a trustee.

At trial, the appellant sought relief under s. 35(1) of the *Trustee Act (Ontario)*, which excuses trustees from liability for breach of trust and failure to seek court direction where the trustee acted honestly and reasonably. However, according to s. 35(2) of the Act, s. 35(1) does not apply to liability for a loss to the trust arising from the investment of trust property, which was the case in this instance. The Court of Appeal upheld this finding. It added that s. 35(1) is only available to trustees who acted reasonably and honestly. In this case, it held that the appellant did not act reasonably or honestly in any event.

At the Court of Appeal, the appellant relied on an exculpatory clause in the trust indenture to bar her from being held personally liable. The trust indenture stated that the trustees were not responsible for each others' non-fraudulent acts, defaults, errors in judgment, or acts or omission or commission. However, the Court of Appeal upheld the trial court's ruling that the exculpatory clause did not protect trustees where trustees improperly delegated their powers or discretion. Rather, it explained that the exculpatory clause was to protect trustees in their management and administration of trust property. The appellant did not act as a trustee and engage in management or administration, as she had wrongfully delegated those powers to her nephews.

The Court of Appeal therefore denied the appellant's appeal, rejecting relief under both s. 35(1) of the *Trustee Act* and through the exculpatory clause and demonstrating that, despite statutory protection, trustees are not immune from being held personally liable for their errors or omissions. The findings from the Penman decision will have equal application to directors of charities who have been involved in similar types of improper delegation of investment decision making.

Penman v Penman is available online at: <http://canlii.ca/t/g2w87>.

Corporate Veil Pierced in Ontario Costs Order against Director

Sean S. Carter.

In a recent decision on costs in *2101641 Ontario Corporation v. Suvarna, et. al.* (S.C.J.) ("*Suvarna*"), a case before the specialized construction lien court of the Ontario Superior Court of Justice in Toronto, the corporate veil of a corporate entity was lifted and \$45,220.00 in costs was ordered personally against a

director (a non-party) of the plaintiff corporation. In *Suvarna*, the plaintiff corporation had registered what the Master indicated in the decision as an “inflated construction lien” and had prosecuted the action for several years until, after failing to post security for costs, the action had been dismissed and the lien discharged.

In the circumstances, it would not be unusual for some costs to be ordered against the plaintiff corporation. However, to have costs ordered against a non-party (particularly a director of the corporation personally), is relatively unique in recent reported case law in Ontario. The court has authority to award costs against a non-litigant where (a) the non-party does not believe the plaintiff has a good cause of action; (b) the non-party counseled commencement of the action; (c) the non-party supported the action; (d) the non-party in effect conducted the action from the sidelines; and, (e) in general, the non party is the “true controlling mind” behind the litigation (collectively, the “Non-Party Test”).

In *Suvarna*, the Master found that the director, Mr. Remzi Cene, and his actions during the litigation fulfilled the Non-Party Test, because, *inter alia*, Mr. Cene was the plaintiff’s “sole directing mind, officer and director... the alter ego of the plaintiff... he is the decision maker. He caused the defendants to incur significant costs”. In addition, the Master found that the plaintiff corporation had “no assets and is no longer a ‘going concern’”, ultimately that “this is exactly the type of situation that cries out for piercing the corporate veil.”

Though any costs order in the litigation process will necessarily be highly dependent on the facts of the particular action and the subjective conduct of the parties, *Suvarna* is an important reminder for directors and officers of charities and not-for-profits that great care needs to be taken when engaging in litigation. Launching any type of litigation prematurely and/or prosecuting it recklessly can not only result in a failure of fiduciary duty to the charity or not-for-profit, but it could even have consequences of a personal nature. Though directors of charities or not-for-profits are unlikely to repeat the exact facts of *Suvarna*, the legal test for costs against a non-party could potentially be fulfilled by a well-meaning but imprudent director or officer.

Court Upholds Employee Termination Clause in Contract

Barry W. Kwasniewski in *Charity Law Bulletin* No. 343, June 24, 2014.

The Ontario Superior Court of Justice released its decision in *Simpson v Global Warranty Management Corp.* (“*Simpson*”) on February 4, 2014 In this case, Eoin Simpson (the “plaintiff”), who was employed as a claims adjuster for Global Warranty Management Corp. (the “defendant”), brought an action against

the defendant for damages for alleged wrongful dismissal. The important issue in this decision was whether the employer may rely on a contractual termination “without cause” clause limiting the employee to those minimum amounts of termination pay prescribed by the *Employment Standards Act, 2000*, notwithstanding that the employer defended the lawsuit on the basis that the termination was for “just cause.” This *Charity Law Bulletin* explores the *Simpson* decision, which upheld the employment contract limiting the plaintiff to minimum termination pay entitlements under the ESA, and explains how this case relates to charities and not-for-profits.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2014/chylb343.pdf>

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Coming Changes to the Trade-marks Act

Sepal Bonni and Terrance S. Carter.

As reported earlier in this *Charity Law Update*, on June 19, 2014, Bill C-31, *Economic Action Plan 2014, No.1* received Royal Assent which introduces sweeping changes to the *Trade-marks Act* once the new legislation comes into force. The new legislation is intended to ensure that Canada meets its international trade-mark obligations as defined in the *Nice Agreement*, the *Madrid Protocol* and the *Singapore Treaty on the Law of Trade-marks*.

The Canadian Intellectual Property Office has stated that the coming-into-force date will be determined after the *Trademark Regulations* have been revised, and relevant IT systems have been updated. Those within the sector are estimating that it may take one year or longer before the amendments are fully implemented.

Upon proclamation, those changes will include the following:

- Registration terms will be significantly reduced from 15 years to 10 years.
- Trade-mark use requirements to obtain a trade-mark registration will be abolished. In this regard applicants will no longer need to identify a date of first use of a mark in Canada. Further, an applicant for a trade-mark in Canada will no longer have to file a declaration of use as a condition to trade-mark registration.
- The definition of a “trade-mark” will be expanded to include more types of non-traditional marks, including 3-dimensional shapes, holograms, moving images, sounds and textures.

- Canada will adopt the goods and services classification system under the *Nice Agreement*, which is currently in use in other jurisdictions, such as the USA and EU.

Canadian charity and not-for-profit brand owners who have previously relied on unregistered common law trade-mark rights should anticipate an influx of trade-mark applications in Canada, and will therefore want to consider taking steps to secure registration of their unregistered common law trade-marks in Canada, ideally before the new legal regime comes into force. Charities and not-for-profits will need to continue to monitor when the new legislation will come into force and watch for further reports in future *Charity Law Updates*. Until the new legislation is proclaimed, it will be business as usual under the current *Trade-marks Act*.

Consultations on Social Enterprise Legislation

Terrance S. Carter and Theresa L.M. Man.

Federal Developments

On June 10, 2014, Industry Canada published the results of its public consultation on the *Canada Business Corporations Act* (“CBCA”). The House of Commons Standing Committee on Industry, Science and Technology (the “Committee”), which conducted a statutory review of the CBCA in 2009–10, had recommended in June 2010 that there be consultations regarding socially responsible enterprises (“SREs”). More specifically, it recommended consultations on the incorporation of hybrid enterprises, which are entities with both profit-making and non-profit goals. In this regard, SREs are described as using a commercial business model to encourage social change.

The consultation reported that there are SREs in the United States, known as low-profit limited liability corporations, and in the United Kingdom, known as community interested corporations. SREs currently exist in BC under the British Columbia *Business Corporations Act* as “community contribution companies”. Similarly, the Nova Scotia *Community Interest Companies Act* has created a new share capital entity in Nova Scotia called a “community interest company”, although the Act is not yet in force. From reviewing the above developments in other jurisdictions, the Committee recommended further consultation concerning whether existing CBCA provisions are sufficient to enable SREs or whether amendments to the CBCA are necessary to support the development of SREs at the federal level

The consultation is available online at: http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_cl00867.html#p3.5

Ontario Developments

In Ontario, the Ministry of Economic Development, Trade and Employment released its study to support social enterprises back in September 26, 2013, entitled *Impact - A Social Enterprise Strategy for Ontario*. Arising out of this study, a consultation group was formed in February 2014 to consider the possible structure that social enterprise legislation might take in Ontario. This consultation group, consisting of a wide range of stakeholders, met on numerous occasions over February, March and April 2014 and produced a panel report for consideration by the (then) Ministry of Consumer Services. With the newly announced cabinet, the report will now be provided to the new Minister of Government and Consumer Services. When the contents of this panel report will be made public is not known at this time, since the timing will be determined by the new Minister.

Canada's First Social Impact Bond Launched

Terrance S. Carter.

Saskatchewan has recently announced “a funding model that is the first of its kind in Canada” for charities and not-for-profits through the launching of a Social Impact Bond (“SIB”) in conjunction with the opening of a supported living home for at-risk single mothers. Under the SIB funding model, the government sets a social outcome that is to be achieved. It then acquires money from private investors in order to achieve this social outcome in exchange for a promise to pay the investors an agreed-upon sum of money if the social outcome is achieved.

Through the SIB, private investors have provided \$1 million of support to open and operate the program. The Government of Saskatchewan may or may not reimburse the investors, depending on the degree to which the social outcome is met. The program’s degree of success will be determined by an independent assessor at the end of the second, fourth and fifth years of the agreement.

By providing the incentive of a reimbursement, SIBs encourage private investors to contribute towards start-ups of charities and toward other programs that may require a significant degree of upfront capital. In addition to supporting local charities, SIBs may save governments money as well. If successful, the SIB could be an interesting development for the charitable and not-for-profit sector which could lead to an alternative form of funding for other charities and not-for-profits in Saskatchewan. If the SIB proves to be viable, other provinces and territories may take notice and also consider adopting SIBs in their respective jurisdictions.

The Government of Saskatchewan's announcement of the SIB is available online at:

<http://www.saskatchewan.ca/government/news-and-media/2014/may/12/social-impact-bond>.

The Tort of Domain Name Passing Off

Sepal Bonni in *Charity Law Bulletin* No. 342, June 24, 2014.

A business or organization may not pass off its goods or services as those of another business or organization. More specifically, any business or organization that misrepresents its goods or services to the public, such that the average person would be confused in the marketplace and lead the individual to believe they were purchasing the goods or services of another more reputable company, could be liable under the tort of passing-off. This *Charity Law Bulletin* explores Canadian case law concerning the tort of passing off, as well as the newer and more specific tort of domain name passing off and their implications to charities and not-for-profits.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2014/chylb342.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2014/chylb342.htm>

Counterterrorism Studies Reveal Growing Concern for Humanitarian Organizations

Nancy E. Claridge and Terrance S. Carter in *Anti-terrorism and Charity Law Alert* No. 36, June 25, 2014.

The Harvard Law School/Brookings Project on Law and Security published two research and policy papers on counterterrorism in May 2014. The papers are entitled *An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts* (the "Counterterrorism Clause Study") and *An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations* (the "Anti-Diversion Study"), and explore the increase in anti-terrorist financing procedures for both grantees and grantors as a result of donor concern with legal and regulatory compliance. This *Anti-Terrorism and Charity Law Alert* provides a summary of the findings in both studies.

Read More:

[PDF] <http://www.carters.ca/pub/alert/ATCLA/ATCLA36.pdf>

Updated Branding and Copyright Book for Charities and NPOs

Terrance S. Carter and U. Shen Goh have recently published an updated edition of their book, *Branding and Copyright for Charities and Non-Profit Organizations, Second Edition* (LexisNexis Canada, 2014). The book, written specifically for charities and non-profit organizations, explains the importance of

branding and copyright, provides an overview of existing branding and copyright legislation, and provides guidance on how organizations can best utilize and protect their valuable assets.

For More Information See:

<http://store.lexisnexis.ca/store/ca/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&skuId=sku-cad-00523&catId=&prodId=prd-cad-00523>

IN THE PRESS

File for continuance under the CNCA before it's too late by Theresa L.M. Man.

Hilborn Charity eNews, June 19, 2014.

[Link] <http://www.charityinfo.ca/articles/File-for-continuance-under-the-CNCA-before-its-too-late>

FATF Mutual Evaluation Of Canada's Anti-Money Laundering Measures by Nancy E. Claridge and Terrance S. Carter.

Mondaq.com, June 12, 2014.

<http://www.mondaq.com/canada/x/320088/Money+Laundering/FATF+Mutual+Evaluation+Of+Canada>
[s](#)

RECENT EVENTS AND PRESENTATIONS

United Way of York Region included Barry W. Kwasniewski in a panel discussion on Human Resources & Employment Law on May 30, 2014.

“Across The Country In 90 Minutes” - The Canadian Bar Association's National Wills, Estates and Trusts Section's inaugural 3-part webinar academy included Terrance S. Carter presenting “Essential Charity Law Update” during Session III of the series on June 3, 2014 .

[Web] <http://www.carters.ca/pub/seminar/charity/2014/tsc0603.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2014/tsc0603.pdf>

Healthcare Philanthropy: Check-Up 2014, co-presented by Carters and Fasken Martineau for the 10th anniversary on June 13, 2014, included the following topics:

“Legal Issues in Managing Endowment Funds” by Terrance S. Carter;

[Web] <http://www.carters.ca/pub/seminar/charity/2014/tsc0613.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2014/tsc0613.pdf>

“Anti-Spam and Healthcare Philanthropy: Practical Guidance for Compliance” by Ryan M. Prendergast.

[Web] <http://www.carters.ca/pub/seminar/charity/2014/rmp0613.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2014/rmp0613.pdf>

St. Paul's University featured Terrance S. Carter and Jennifer M Leddy speaking on “Religious Institutes as a Corporate Entity” at their event titled “Legal Education for Leadership of Religious Institutes” held on June 16, 2014.

AJAG Professional Development Workshop presented by Terrance S. Carter on June 24, 2014, entitled “Getting Ready for the CNCA Before it is Too Late.”

Imagine Canada’s FREE Charity Tax Tools Webinar held on June 24, 2014 was a presentation by Barry W. Kwasniewski entitled “Directors’ & Officers’ Insurance – Know Your Coverage and Your Options.”

Recording available at <http://sectorsource.ca/managing-organization/charity-tax-tools/charity-tax-tools-webinars>.

UPCOMING EVENTS AND PRESENTATIONS

Hong Fook Mental Health Association will feature two presentations by Theresa L.M. Man entitled “Directors’ and Officers’ Liability: The Essentials and Beyond” and “In’s and Out’s of the New Canada Not-for-Profit Corporations Act (CNCA) and New Ontario Not-for-Profit Corporations Act (ONCA)” on June 28, 2014.

What You Missed Over the Summer: Recent Developments in Charity Law being hosted by the Ontario Bar Association will include Theresa L.M. Man as speaker on September 9, 2014.

Details available at http://www.cbapd.org/details_en.aspx?id=ON_14CHA0909T.

The 21st Annual Church & Charity Law™ Seminar will be held at Portico Community Church in Mississauga, Ontario, on Thursday, November 13, 2014.

Details and online registration will be available soon at <http://www.charitylaw.ca>.

CONTRIBUTORS

Editor: Terrance S. Carter

Assistant Editor: Nancy E. Claridge



Sepal Bonni - Called to the Ontario Bar in 2013, Sepal joined Carters' Ottawa office to practice intellectual property law after having articulated with a trade-mark firm in Ottawa. Sepal has practiced in all aspects of domestic and foreign trade-mark prosecution before the Canadian Intellectual Property Office, as well as trade-mark portfolio reviews, maintenance and consultations, and is increasingly interested in the intersection of law and technology, along with new and innovative strategies in the IP world.



Terrance S. Carter – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, is counsel to Fasken Martineau on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Carswell 2013), and a co-editor of *Charities Legislation and Commentary* (LexisNexis Butterworths, 2014). He is recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*, and is Past Chair of the CBA National and OBA Charities and Not-for-Profit Law Sections. He is editor of www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca.



Sean S. Carter – Called to the Ontario Bar in 2009, Sean practices general civil, commercial and charity related litigation. Formerly an associate at Fasken Martineau DuMoulin LLP, Sean has experience in matters relating to human rights and charter applications, international arbitrations, quasi-criminal and regulatory matters, proceedings against public authorities and the enforcement of foreign judgments. Sean also gained valuable experience as a research assistant at Carters, including for publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*.



Nancy E. Claridge – Called to the Ontario Bar in 2006, Ms. Claridge is a partner with Carters practicing in the areas of charity, anti-terrorism, real estate, corporate and commercial law, and wills and estates, in addition to being the firm's research lawyer and assistant editor of *Charity Law Update*. After obtaining a Masters degree, she spent several years developing legal databases for LexisNexis Canada, before attending Osgoode Hall Law School where she was a Senior Editor of the *Osgoode Hall Law Journal*, Editor-in-Chief of the *Obiter Dicta* newspaper, and was awarded the Dean's Gold Key Award and Student Honour Award.



Jacqueline M. Demczur – A partner with the firm, Ms. Demczur practices in charity and not-for-profit law, including incorporation, corporate restructuring, and legal risk management reviews. Mrs. Demczur has been recognized as a leading expert in charity and not-for-profit law by *Lexpert*. She is a contributing author to Industry Canada's *Primer for Directors of Not-For-Profit Corporations*, and has written numerous articles on charity and not-for-profit issues for the *Lawyers Weekly*, *The Philanthropist* and *Charity Law Bulletin*, among others. Ms. Demczur is also a regular speaker at the annual *Church & Charity Law*TM Seminar.



Barry W. Kwasniewski - Mr. Kwasniewski joined Carters' Ottawa office in October, becoming a partner in 2014, to practice in the areas of employment law, charity related litigation, and risk management. After practicing for many years as a litigation lawyer in Ottawa, Barry's focus is now on providing advice to charities and not-for-profits with respect to their employment and legal risk management issues. Barry has developed an expertise in insurance law, and provides legal opinions and advice pertaining to insurance coverage matters to charities, not-for-profits and law firms.



Jennifer Leddy – Ms. Leddy joined Carters’ Ottawa office in 2009, becoming a partner in 2014, to practice charity and not-for-profit law following a career in both private practice and public policy. Ms. Leddy practiced with the Toronto office of Lang Michener prior to joining the staff of the Canadian Conference of Catholic Bishops (CCCCB). In 2005, she returned to private practice until she went to the Charities Directorate of the Canada Revenue Agency in 2008 as part of a one year Interchange program, to work on the proposed “Guidelines on the Meaning of Advancement of Religion as a Charitable Purpose.”



Theresa L.M. Man – A partner with Carters, Ms. Man practices in the area of charity and not-for-profit law and is recognized as a leading expert by *Lexpert* and *Best Lawyers*. She is vice chair of the Executive of the Charity and Not-for-Profit Section of the OBA and an executive member of the CBA. In addition to being a frequent speaker, Ms. Man has also written articles for numerous publications, including *The Lawyers Weekly*, *The Philanthropist*, *Planned Giving Pulse*, *Canadian Fundraiser eNews* and *Charity Law Bulletin*. She is co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Carswell in 2013.



Ryan Prendergast – Called to the Ontario Bar in 2010, Mr. Prendergast joined Carters with a practice focus of providing corporate and tax advice to charities and non-profit organizations concerning incorporation, ongoing corporate compliance, registration of charities, audits and internal appeals with CRA, as well as the amalgamation and merger of charities. Ryan is a regular speaker and author. In addition, Ryan has contributed to several *Charity Law Bulletins* and is a regular presenter at the annual *Church & Charity Law Seminar*.



Esther S.J. Oh – A partner with Carters, Ms. Oh practices in charity and not-for-profit law, and is recognized as a leading expert in charity and not-for-profit law by *Lexpert*. Ms. Oh has written numerous articles on charity and not-for-profit legal issues, including incorporation and risk management for www.charitylaw.ca and the *Charity Law Bulletin*. Ms. Oh is a regular speaker at the annual *Church & Charity Law*TM Seminar, and has been an invited speaker to the Canadian Bar Association, Imagine Canada and various other organizations.



Linsey E.C. Rains - Called to the Ontario Bar in 2013, Ms. Rains joined Carters to practice charity and not-for-profit law with a focus on federal tax issues after more than a decade of employment with the Canada Revenue Agency (CRA). Having acquired considerable charity law experience as a Charities Officer, Senior Program Analyst, Technical Policy Advisor, and Policy Analyst with the CRA’s Charities Directorate, Ms. Rains completed her articles with the Department of Justice’s Tax Litigation Section and CRA Legal Services.

ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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CARTERS PROFESSIONAL CORPORATION SOCIÉTÉ PROFESSIONNELLE CARTERS

PARTNERS:

Terrance S. Carter B.A., LL.B. tcarter@carters.ca
(Counsel to Fasken Martineau DuMoulin LLP)
Jane Burke-Robertson B.Soc.Sci., LL.B. (1960-2013)
Theresa L.M. Man B.Sc., M.Mus., LL.B., LL.M. tman@carters.ca
Jacqueline M. Demczur B.A., LL.B. jdemczur@carters.ca
Esther S.J. Oh B.A., LL.B. estheroh@carters.ca
Nancy E. Claridge B.A., M.A., LL.B. nclaridge@carters.ca
Jennifer M. Leddy B.A., LL.B. jleddy@carters.ca
Barry W. Kwasniewski B.B.A., LL.B. bwk@carters.ca

ASSOCIATES:

Sean S. Carter B.A., LL.B. scarter@carters.ca
Ryan Prendergast B.A., LL.B. rprendergast@carters.ca
Kristen D. van Arnhem B.A., J.D. kvanarnhem@carters.ca
Linsey E.C. Rains B.A., J.D. lrains@carters.ca
Sepal Bonni B.Sc., M.Sc., J.D. sbonni@carters.ca

COUNSEL:

Bruce W. Long B.A., LL.B. blong@carters.ca

211 Broadway, P.O. Box 440
Orangeville, Ontario, Canada L9W 1K4
Tel: (519) 942-0001
Fax: (519) 942-0300

117 Centrepointe Drive, Suite 124
Ottawa, Ontario, Canada K2G 5X3
Tel: (613) 235-4774
Fax: (613) 235-9838

2 Robert Speck Parkway, Suite 750
Mississauga, Ontario, Canada, L4Z 1H8
Tel: (905) 306-2791
Fax: (905) 306-3434

TD Canada Trust Tower
161 Bay Street, 27th Floor, PO Box 508
Toronto, Ontario, Canada M5J 2S1
Tel: 416-675-3766
Fax: 416-576-3765



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Ottawa · Toronto
Mississauga · Orangeville
Toll Free: 1-877-942-0001

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